



DEPARTMENT OF PUBLIC SAFETY POLICIES & PROCEDURES



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SUBJECT: FOREIGN NATIONALS; CONSULAR NOTIFICATION AND
ACCESS

REVISION NO:

ORIGINAL

1.0 PURPOSE

The purpose of this policy is to provide Department of Public Safety commissioned employees with guidelines and procedures regarding consular notifications and access required upon the arrest, detention, or death of foreign nationals.

2.0 POLICY

It is the policy of DPS to adhere to the guidance provided by the United States Department of State concerning consular notification and access based on treaty obligations as outlined in the agreements set forth in the Vienna Convention on Consular Relations (VCCR). Adherence to these obligations assists foreign governments to provide assistance to foreign nationals arrested in the United States and helps the U.S. government protect U.S. citizens abroad. DPS shall ensure that all foreign nationals are treated with respect and provided with immunities under international law where applicable.

3.0 APPLICABILITY

This policy is applicable to all Department of Public Safety commissioned personnel.

4.0 REFERENCES

- A. CALEA Chapter 1 - Section 1- Standard 4 – Consular Notification
- B. United States Department of State Publication 10969, “Consular Notification and Access”, US Department of State, www.travel.state.gov/law/consular/consular_753.html.

5.0 DEFINITIONS

- A. **Arrest** – The taking of a person into custody by legal authority.
- B. **Consul or Consular Officer** – A citizen of a foreign country employed by that government and authorized by both the sending and the host countries to provide assistance on behalf of that government to its citizens in another country. Such persons are generally assigned to a consular section of an embassy in Washington D.C. or to a consulate in another U.S. city. Consular officers or consuls who are accredited by the U.S. Department of State bear identification cards indicating that as issued by the U.S. Department of State.
- C. **Detainee** – A detainee in this context is a foreign national who is arrested or detained pending investigation or judicial appearance, or both. Brief stops for motor vehicle violations or similar incidents are not considered detentions for purposes of this policy.
- D. **Diplomatic Immunity** – A requirement by international law under which certain foreign government officials are not subject to the jurisdiction of local courts and authorities, for both their official and, to a large extent, their personal activities.
- E. **Foreign National** – For purposes of consular notification and access, a foreign national is any person who is not a U.S. citizen. Lawful permanent resident aliens who have resident alien registration cards (green cards) retain their foreign nationality and must

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be considered foreign nationals. The terms foreign national and alien are used interchangeably. Undocumented or illegal aliens are also foreign nationals.

F. Mandatory Notification – As identified in this policy, certain foreign nations have entered into specific bilateral agreements with the United States requiring that their consulate or embassy be notified of any arrest or detention of a foreign national of their country regardless of the desires of the arrested or detained foreign national.

G. Notification at the Foreign Nationals Option – Foreign nationals from countries that are parties to the VCCR must be provided with the option of having consulate notified of their arrest or detention. If the detainee requests notification, a responsible detaining official must ensure that notification is made.

H. Vienna Convention on Consular Relations (VCCR) – A multi-lateral treaty completed in 1963 to codify consular practices that developed through customary international law, bilateral treaties, and a number of regional treaties, which provides rules for the operation of consulates and the functions of consuls and honorary consuls. Whenever a foreign national is arrested or detained in New Mexico, the rules of the VCCR apply.

I. Without Delay – There shall be no “deliberate delay” for notification. Notification shall occur as soon as reasonably possible under the given circumstances. An acceptable time frame is between twenty-four (24) to seventy-two (72) hours after initial contact.

6.0 PROCEDURE

A. Identification – In conjunction with law and international treaties, when officers/agents encounter foreign nationals during the course of their lawful duties, they shall comply with the following procedures:

1. Enforcement of immigration laws and the arrest of undocumented foreign nationals resides exclusively with the United States Federal Government.
2. Law enforcement officers may NOT stop, detain and question, arrest or place an immigration or a U.S. Immigration & Customs Enforcement (I.C.E.) hold on any person NOT suspected of crimes, solely on the grounds that they may be undocumented and deportable foreign nationals. When officers make a lawful stop, they may not ordinarily detain the vehicle's occupants beyond a reasonable period of time required for the disposition of the matter that justified the initial stop.
3. Officers shall not request immigration documents but may consider them for purposes of identification. Officers shall accept the Mexican Consular Identification Card (Matricula Consular de Alta Seguridad) as a valid form of identification. The Mexican Consular ID Card is not an indication of a person's immigration status, nor is it sufficient evidence to establish reasonable suspicion of a person's immigration status.
4. Officers shall not inquire about or seek proof of a person's immigration status unless the person is in custody or is a suspect in a criminal investigation for a non-immigration criminal violation.
5. When the arrest of an undocumented immigrant is necessary for a criminal violation, officers shall notify the U.S. Immigration & Customs Enforcement (I.C.E.) immediately so that they may respond appropriately.
6. Officers are not required to notify federal immigration officials and shall not call federal immigration officials to the scene of a stop or investigation except in the case of suspected human trafficking (i.e., a traffic stop involving a large amount of undocumented foreign nationals). The officer shall notify a supervisor of the incident

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prior to contacting I.C.E. officials. The incident shall be properly documented in an offense/incident report.

7. This policy shall not prevent an officer from properly investigating or taking necessary action in a non-immigration criminal violation.

B. Consular Notification Obligations

1. Consular notification obligations are triggered upon any of the following situations:
 - a. The arrest or detention of a foreign national.
 - b. The death or serious injury of a foreign national.
 - c. An injury crash involving a foreign national.
2. In cases where a foreign national is the victim of a serious crime or felony, the officer shall ask the victim whether he or she would like consular notification to be made.
3. Officers who suspect that a person being arrested or detained is not a U.S. citizen shall inquire about his or her nationality in order to determine whether consular notification requirements apply. When such a request is made, the officer shall explain the purpose of the inquiry.
4. If an arrestee or detainee indicates that he or she is a foreign national, the officer shall ask for a passport or green card as identification. The foreign national's country shall be determined using this identification. If no citizenship documentation regarding identification can be provided, the officer shall accept the foreign national's own statement about nationality.
5. Undocumented illegal aliens are also entitled to consular notification and access.
6. Persons who indicate that they are U.S. citizens shall be presumed to be citizens.
7. Persons who indicate that they are dual citizens of another country and the U.S. shall be treated as a U.S. citizen. Consular notification is not required under this circumstance.
8. Refer to Attachment D for an illustration indicating the Consular Notification Process (CNP) as provided by the U.S. Department of State in reference to the arrest of a non-U.S. Citizen.

C. Mandatory versus Optional Consular Notification

1. Foreign nationals shall be informed of the option to communicate with their consular officials whenever they are arrested or detained.
 - a. Foreign nationals shall have the option of deciding whether to have their consular representative notified of the arrest. If the foreign national's country of origin is on the Mandatory Notification Countries and Jurisdictions List, then notification is mandatory. This list can be located on the U.S. Department of State website, www.travel.state.gov/law/consular/consular_753.html.
 - b. The nations on the Mandatory Countries and Jurisdictions List have bilateral treaties with the United States that require authorities to make notifications to consular officials of the arrest or detention of one of their nationals, regardless of the national's wishes.
2. The arresting officer or supervisor shall notify an arrested or detained foreign national when a mandatory notification has been made to his or her consulate or embassy.

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- a. The individual shall be advised that he or she is not required to accept the consulates assistance, but that the consulate may be able to offer assistance in regards to obtaining legal counsel, contacting family members, and in visiting the individual while detained.
 - b. The reason for the arrest and detention does not have to be disclosed to the consular official. It should only be provided when specifically requested by the official or when it is required under a specific provision as outlined in a bilateral treaty.
 - c. Mandatory notification requirements must be honored, even if the officer has reason to believe that the foreign national may suffer persecution or mistreatment by his or her government. Precautions should be taken to prevent the release of sensitive information regarding the foreign national.
3. Under **NO** circumstances shall any information indicating that a foreign national has applied or is considering applying for asylum be disclosed to a foreign national's government official.

D. How to Notify Consular Officials

1. When an officer believes that consular notification is required, he or she shall notify a supervisor.
2. The supervisor shall verify the foreign nationals country of origin and determine whether the consular notification is mandatory or optional and at the foreign nationals request.
3. Regarding optional notifications, the supervisor or detaining officer shall ascertain whether the foreign national desires notification be made.
4. Statements shall be provided to foreign nationals for their review and signature as provided in Attachment A. Translations of these statements are available on the U.S Department of State website, www.travel.state.gov/law/consular/consular_753.html. A Spanish version of the statements is included in Attachment A. A signed copy of the form shall be retained with the arrest and booking documentation.
5. Notifications to consuls or embassies shall be made by facsimile transmission as soon as reasonably possible and a copy of the completed fax transmission verification sheet retained with the arrest and booking documentation. A list of foreign consulates and embassies with contact information is provided on the U.S. Department of State website, www.travel.state.gov/law/consular/consular_753.html. A suggested Fax Sheet for Notifying Consular Officers of Arrest or Detentions can be found in Attachment B.
6. Consular Officials shall also be notified upon the death or serious injury of a foreign national that comes to the attention of DPS. A list of foreign consulates and embassies with contact information is provided on the U.S. Department of State website, www.travel.state.gov/law/consular/consular_753.html. A suggested Fax Sheet for Notifying Consular Officers of Death/Serious Injuries can be found in Attachment C.
7. Once it is determined that notification shall be made, the notification shall be done **without delay**.
8. Arresting officers shall notify the detention officer/facility of the fact that the arrestee is a foreign national and of their right to consular notification.
9. Arresting officers shall ensure that consular notifications are completed.

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10. Arresting officers shall document this notification on the arrest/booking form as well as in the narrative of the offense/incident report or supplemental report.
11. A record of all instances that a consul has been contacted shall be kept to demonstrate that notification requirements have been met as set forth by the U.S. Department of State.

E. Consular Access to Arrested/Detained Foreign Nationals

1. The Department of Public Safety shall provide consular officers with reasonable access to detainees who request such access consistent with DPS policies and procedures regarding visitation of detainees.
2. Authorized personnel shall permit the transmission of communications from foreign nationals to their respective consular official provided that the communication is of reasonable duration and frequency.
3. Consular officials shall not serve as legal counsel for their foreign national constituents and do not have attorney-client privileges. Consular officials may be allowed to converse privately with their constituent (foreign national) if they so request and if the request can be reasonably accommodated.
4. Consular officers may provide the following types of assistance to a detainee under the terms of international agreements, although such services may vary by the capabilities of country representation in the United States.
 - a. They may determine the detainees situation and needs.
 - b. They may arrange for legal counsel and monitor case progress.
 - c. They may contact authorities concerning the conditions of confinement and bring personal items to the detainee as permitted by DPS policy.

F. Dealing with Foreign Nationals with Diplomatic Immunity

1. When a foreign national claims to enjoy diplomatic immunity, officers shall identify and verify the diplomatic status of the detainee in the most efficient manner possible.
2. Certain specified foreign persons are immune from arrest under certain conditions. These include the following:
 - a. Foreign Diplomats, such as Ambassadors and Foreign Ministers, their families, servants and staff are totally immune from arrest for any offense. Any questions of whether an individual is entitled to immunity may be directed to the U.S. Department of State.
 - b. Foreign Consuls, their families, servants, and employees are not immune from arrest, except for the Mexican Consul, which has limited immunity. If any Foreign Consul is involved in an offense, a supervisor will be contacted. The supervisor can consult the U.S. Department of State website for further clarification. Supervisors may also contact the U.S. Department of State with any questions.
 - c. Immunity is not extended to the families, servants, or employees of the Consulate. Whenever practical, they will be released on misdemeanor charges in lieu of booking, pending the issuance of a complaint for the offense. A citation in lieu of arrest may be issued if the appropriate criteria are met.
3. Only an identity card issued by the U.S. Department of State, Office of Protocol, or by the U.S. Mission to the United Nations may be used as valid identification for diplomats and consular officials.

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4. Foreign diplomatic passports, U.S. diplomatic visas, tax exemption cards, vehicle registration, license plates, and driver licenses should not be used to determine whether an individual enjoys immunity.
5. When legal grounds allow, officers should detain an individual who is unable to produce valid identification but claims diplomatic immunity. He or she shall be informed of the reason for the detention until the U.S. Department of State can confirm the proper identity.
6. If a person claims immunity when arrested or detained, the burden of proof shall be on the individual to provide proper identification. Officers shall contact a supervisor and make all reasonable attempts to verify the individual's claim of immunity.
7. Once the individual's status of immunity has been confirmed, he or she shall be released immediately and the incident shall be fully documented in accordance with this policy.
8. Consular notification procedures shall be followed even if the individual enjoys diplomatic immunity.
9. When an officer makes contact with a foreign national with diplomatic immunity, the U.S. Department of State shall be contacted without delay.

7.0 ATTACHMENTS

- A. Suggested Statements to Foreign Nationals Arrested or Detained (Spanish version included).
- B. Suggested Fax Sheet for Notifying Consular Officers of Arrest or Detention.
- C. Suggested Fax Sheet for Notifying Consular Officers of Death/Serious Injuries.
- D. Illustration of Consular Notification Process (CNP)

8.0 APPROVAL

APPROVED BY: s/John Denko
DPS Cabinet Secretary

DATE: May 10, 2010